

Honorable ROBERT J. BRYAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff

v.

SERVE ALL, HELP ALL, INC.; and  
JOHN DOE 1-10,

Defendants.

CASE NO. 3:21-cv-05338-RJB

MOTION FOR SUMMARY  
JUDGEMENT ON  
COUNTERCLAIM

NOTED FOR:  
JANUARY 27, 2023  
ORAL ARGUMENT REQUESTED

Plaintiff Nathen Barton moves the Court for Summary Judgement on Serve All, Help All Inc's ("SAHA") counterclaims.

SAHA searches public records for struggling homeowners they believe will be receptive to their services. This lawsuit is about consent – SAHA says they can robocall without it:

“Because we were sending a solicitation from a non-profit organization, it is our understanding we did not need consent;” Exhibit A, page 2, lines 4-5.

This is simply wrong.

“It shall be unlawful for *any* person . . . to make *any* call (other than a call made . . . with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service.” [47 U.S. Code § 227\(b\)](#). Emphasis added. Non-profit organizations are not exempt from the Telephone Consumer Protection Act, [RCW 80.36.400](#), or [RCW 80.36.390](#).

SAHA thought William Wilder's ("Mr. Wilder") distressed real estate made him a potential customer. They blasted over five dozen phone numbers to reach him – anyone's phone number associated with the property. One of those numbers was Barton's – (360) 910-1019. They thought there was a 3% chance Mr. Wilder's *son* used this phone number and that was enough for SAHA to robocall it.

They don't really believe they can robocall without consent, so they are cagey on the phone. Their robocalls don't mention the entity behind the call (see Exhibit B ¶7), and their phone agents use "Nonprofit Alliance" instead of their actual business name or registered *d/b/a* Nonprofit Alliance of Consumer Advocates. This is legally insufficient. The FCC requires telemarketers to identify their actual business name.

SAHA only has one reason to hide their identity. They know their calls are illegal. What legal business don't want consumers to know who they are talking to?

SAHA is exactly why the TCPA was enacted. Plaintiff believes he received over a dozen robocalls from them, and SAHA was robocalling over five dozen phone numbers trying to reach *one man*. Because Mr. Wilder's financial distress might make him receptive to their solicitation.

The third circuit held 'we reiterate that the [TCPA] statute is remedial in nature and "should be construed to benefit consumers."' <sup>1</sup> This Court should protect consumers from telemarketers like SAHA.

### **SAHA Blasted Dozens of Phone Numbers**

Pepe Abad testified (Exhibit C) that when they find a potential customer, *they pull all the phone numbers connected to that real estate and they call them all*:

"Then we obtain client contact information from various search engines . . . this provides us all 'known' associated mobile phone numbers associated with that property address . . .

<sup>1</sup> [\*Daubert v. NRA Grp., LLC\*](#), 861 F.3d 382, 390 (3d Cir. 2017)

1 We send . . . SMS messages to each record with brief information on our free loan  
2 modification services”. Exhibit C, page 1, lines 18-21

3 In discovery, SAHA turned over the names and phone numbers of the people associated  
4 with the property address (Exhibit J) – 4738 Bellwood Dr Ne<sup>2</sup>.

5 Exhibit J lists 65 phone numbers associated Bellwood Dr and according to Abad’s  
6 process he testified to in Exhibit C, they all got called in their quest to reach Mr. Wilder.

7 Duncan testified (Exhibit B ¶10) that:

8 “Further, in reviewing data, I noticed something when I looked at the original data file  
9 [Exhibit J]. It looks like the number 3609101019 was actually William's son's mobile  
10 number, Kevin Gene Wilder. And I believe that we do various free searches on the  
internet for the names & phone numbers of all the addresses residents due to the time  
sensitivity of the pending foreclosure.” Emphasis added.

11 This again matches Exhibit J – a search for “3609101019” shows that phone number is  
12 associated with Kevin Gene Wilder. Along with 11 *other* phone numbers<sup>3</sup>.

13 **This is a critical detail in the lawsuit. SAHA didn’t mistakenly solicit Barton**  
14 **thinking they were soliciting Mr. Wilder. SAHA willfully and knowingly blasted the phone**  
15 **number they knew *didn’t* belong to Mr. Wilder in the hopes it *might* lead to Mr. Wilder.**

16 SAHA blasted over five dozen phone numbers with robocalls because they wanted to sell  
17 Mr. Wilder a mortgage. Most appalling is the next to last column in Exhibit J, a percentage.

18 This percentage is an indication of how likely the phone number is associated with the  
19 person. SAHA’s own data said if they dialed (360) 910-1019, there was only a 3% chance they  
20 would reach the *son* of the man they really wanted to speak with to sell him a mortgage, and they  
21 decided it was a good idea to robocall it many times.

22  
23 <sup>2</sup> Search Exhibit J for “William Wilder”. The address associated with “William Wilder” is 4738 Bellwood Dr Ne.

24 <sup>3</sup> Exhibit J lists phone numbers 3609101019, 5032531563, 5033587789, 5034921756, 5035058602, 5035440473, 5036532697, 5036699152, 5036740325, 5036746650, 5037361399, 5413013149 with Kevin Gene Wilder.

SAHA is exactly the reason the TCPA was enacted – to stop telemarketers from blasting over five dozen phone numbers in search of one man. And to stop them from doing so anonymously.

### Questions

- Suppose a tax specialist finds the name and address of a lottery winner from public records. Can the tax specialist legally robocall all the people connected to the winner in the hopes of reaching the winner?
- The FCC and various courts in the ninth circuit say that recipients of unwanted telephone solicitations have no legal duty to mitigate TCPA statutory damages. If the tax specialist reaches Barton instead of the lottery winner, is Barton obligated to quickly hang up the phone or tell the tax specialist they have the wrong person? Is Barton allowed to converse with the tax specialist to investigate the people responsible for the illegal call?
- If the tax specialist falsely claims to be business “Lottery Tax Consultants” and a call recipient then consented to more calls, did the recipient consent to future calls from Lottery Tax Consultants, or the tax specialist?
- If the tax specialist must obtain *prior* consent before placing the first telephone call (and using artificial or prerecorded voice), can a call recipient give it *during* the call?

### SAHA’s Claim that Barton “opted in” on a Website is Wrong

On June 23, 2022, SAHA filed a counterclaim in Dkt. 82 alleging:

“SAHA is informed and believes and thereon allege that Counterdefendant NATHEN BARTON in or about February opted into a marketing campaign to receive communication from an entity operated or represented by the Counterclaimants or one of its affiliates.” *Id* at ¶3.4.

“Counterdefendant NATHEN BARTON opted in to receive information from SAHA or one of their affiliates by providing his phone number. Unfortunately, the Complaint does not specify which number that is.” *Id* at ¶3.5.

They knew this was false before they filed Dkt. 82.<sup>4</sup> Now they openly admit it:

- “The information obtained from Non Profit Alliance/SAHA is received by me from Pepe Abad. He obtains the information from public data bases.”. Exhibit B ¶5.
- “When I was originally asked for information regarding the calls that are the subject of this lawsuit, I originally stated it was from one of our websites. . . . By the time I had realized it was . . . not a web posting, the attorney had already submitted an answer.” Exhibit B ¶9.
- Pepe Abad testified: “I obtain Public record Data from Property Radar on all properties with Notice of Defaults and Notice of Trustee Sales”. Exhibit C, page 1, lines 15-16.
- “Then we obtain client contact information from various search engines . . . this provides us all 'known' associated mobile phone numbers associated with that property address . . . We send . . . SMS messages to each record with brief information on our free loan modification services”. Exhibit C, page 1, lines 18-21.
- See also their answer to Interrogatory 21 (Exhibit A):

**INTERROGATORY NO. 21:** You have said that you acquired phone number (360) 910- 1019 from a vendor who obtained the number from public records. What information do you have about when these public records were first published?

**ANSWER** See attached declaration of Pepe Abad.

- Abad’s declaration is Exhibit C. See also Exhibit D – Barton asks SAHA for many documents and SAHA gives identical or nearly identical responses:

---

<sup>4</sup> Opposing Counsel testified: “Essentially, they believe the phone number in question was purchased from a marketing company who provides leads regarding people facing foreclosure, and that the number was, at the time of receipt, assigned to someone other than Mr. Barton.” Dkt. 57, 2:21-23

**PRODUCTION REQUEST NO. 1:** In Paragraph 3.2 of Dkt 46 you state: “Counterdefendant NATHEN BARTON opted in to receive information from SAHA or one of their affiliates by providing his phone number” Produce any and all documents of this allegation Barton “opted in”.

**RESPONSE:** We will seek amend our answer and counterclaim with information based on our research. There is nothing specific to Mr. Barton as the initial contact was meant for William Wilder who was associated with the phone number at the time we received information.

### Housekeeping – The Burden of Proof on Express Consent

This section will be referred to later in the Motion. Express consent in the 9<sup>th</sup> circuit is not an element of a plaintiff's *prima facie* case but is an affirmative defense for which the defendant bears the burden of proof. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*<sup>5</sup> (“[W]e conclude that the creditor should be responsible for demonstrating that the consumer provided prior **express consent**.... Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior **express consent**.”); see also *Grant v. Capital Mgmt. Servs., L.P.*<sup>6</sup> (“‘[E]xpress consent’ is not an element of a TCPA plaintiff's *prima facie* case, but rather is an affirmative defense for which the defendant bears the burden of proof.”). The ninth circuit has repeatedly found the same.<sup>7</sup>

<sup>5</sup> <https://docs.fcc.gov/public/attachments/FCC-07-232A1.pdf> Emphasis added.

<sup>6</sup> *Grant v. Capital Mgmt. Servs. L.P.*, No. 11-56200, 3 (9th Cir. Sep. 2, 2011)

<sup>7</sup> *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, (9th Cir. 2017) and *Wakefield v. Visalus* [Ninth Circuit Court of Appeals Opinion](#) filed on 10/20/2022 affirming “Express consent is . . . an affirmative defense for which the defendant bears the burden of proof”.

## SAHA's Fraud Claim Fails

To the extent SAHA's fraud claim is predicated on the allegation Barton went on a website and requested calls (*Id* at ¶3.7, ¶3.8, ¶4.2, ¶4.4, ¶4.5, ¶4.6), they admit this storyline is false. They make three backup allegations:

“Upon receiving the auto-dialed phone call, rather than hanging up or selecting the option to remove his number BARTON opted to contact SAHA.” *Id* at ¶3.10

and

“BARTON used a phone he recently purchased and using information in that phone, responded to solicitations meant for the previous owner of the phone number”. *Id* at ¶4.3

and

“SAHA is informed and believes and thereon alleges that BARTON opted in on a call on February 15, 2021.” *Id* at ¶4.7.

All of them are legally insufficient for a fraud claim.

### **Why “Upon receiving the auto-dialed phone call, rather than hanging up or selecting the option to remove his number BARTON opted to contact SAHA.” Fails**

SAHA's first robocall to Barton was illegal. They have admitted they obtained Plaintiff's phone number from public records and called it without Plaintiff's consent (Exhibit A).

20	<b>INTERROGATORY NO. 15:</b> In (Plaintiff's Request for) Admission 109, you admitted you
21	purchased the name, address, and phone number for William Wilder from a vendor. What caused
1	you to believe that the recipient of the first phone call you subsequently made to that phone
2	number consented to the call.
3	<b>ANSWER:</b>
4	<i>Because we were sending a solicitation from a non-profit organization, it is our</i>
5	<i>understanding we did not need consent; therefore we do not have information on that.</i>

1 In receiving an illegal call, Barton had no duty to hang up or selecting the option to  
 2 remove his number. SAHA is using a fraud claim for what amounts to a mitigation of damages  
 3 argument. Barton had no duty to attempt to remove his number or choose not to speak with a  
 4 SAHA representative. See *Trim v. Mayvenn, Inc.*<sup>8</sup>:

5 Mayvenn further contends Trim's failure to “complain” or “respond with a ‘STOP’  
 6 message” upon receiving the first text from Mayvenn shows that she “took steps to allow  
 7 the continuance of the injury while building a record to facilitate a later claim.” (See Mot.  
 8 at 10:13-11:2.) Such argument, however, “misstates the injury required to bring a TCPA  
 9 claim and assumes a failure to mitigate statutory damages where no such duty exist[s].”  
 10 See *N.L. v. Credit One Bank, N.A.*, Case No. 2:17-cv-01512-JAM-DB, 2018 WL  
 11 5880796, at \*4 (E.D. Cal. Nov. 8, 2018) (rejecting argument that plaintiff who “allowed  
 the calls to continue after consulting with legal counsel” lacked standing to bring TCPA  
 claim, [affirmed on appeal](#)); see also *Ahmed v. HSBC Bank USA, Nat'l Assoc.*, Case No.  
 ED CV 15-2057 FMO (SPx), 2017 WL 5720548, at \*2 (C.D. Cal. Nov. 6, 2017) (noting  
 “weight of available authority indicates there is no duty to mitigate statutory damages in .  
 . . TCPA cases” (internal quotation, citation, and alteration omitted)) (collecting cases).”  
[Trim v. Mayvenn, Inc.](#), 20-cv-03917-MMC, 4 (N.D. Cal. Apr. 5, 2022).

12 See also *Powell v. West Asset Management, Inc.*<sup>9</sup> (noting that “in a March 2000  
 13 Enforcement Action Letter<sup>10</sup>, the Federal Communications Commission (“FCC”) indicated that  
 14 the TCPA does not impose a duty to mitigate with respect to the receipt of unsolicited faxes . . .  
 15 While the FCC Enforcement Action Letter concerns unsolicited faxes, covered under Section  
 16 227(b)(1)(C), and not unsolicited telephone calls covered under Section 227(b)(1)(A), it is  
 17 equally persuasive given the similarity of the statutory provisions.”).

18 Court after court has held likewise:

- 19 • “the Court finds that the weight of available authority indicates that there is no  
 20 duty to mitigate statutory damages in these cases”<sup>11</sup>

21  
 22 <sup>8</sup> *Trim v. Mayvenn, Inc.*, 20-cv-03917-MMC, 4 (N.D. Cal. Apr. 5, 2022)

23 <sup>9</sup> *Powell v. West Asset Management, Inc.*, 773 F. Supp. 2d 761, 764 (N.D. Ill. 2011)

24 <sup>10</sup> <https://transition.fcc.gov/eb/Orders/21c.txt>

<sup>11</sup> *Springer v. Fair Isaac Corp.*, No. 14-CV-02238-TLN-AC, 8 (E.D. Cal. Nov. 13, 2015)



- 1 • “This theory misstates the injury required to bring a TCPA claim and assumes a  
2 failure to mitigate statutory damages where no such duty existed”<sup>12</sup>
- 3 • “Mitigation of damages is not a defense under the TCPA, and each instance of a  
4 violation is independently actionable”<sup>13</sup>
- 5 • “The TCPA does not expressly include a duty of callees to mitigate the  
6 statutorily-prescribed damages by answering or returning telephone calls received  
7 from automatic dialing machines and informing the calling entity that it has the  
8 incorrect number.”<sup>14</sup>
- 9 • “There is no duty to mitigate in TCPA cases”<sup>15</sup>
- 10 • “Autoflex had no duty to contact . . . and ask them to stop violating the TCPA” <sup>16</sup>

SAHA can’t create duty to mitigate TCPA damages via a fraud claim.

**Why “BARTON used a phone he recently purchased and using information in that phone, responded to solicitations meant for the previous owner of the phone number” Fails**

This argument fails for two reasons. First, they have no evidence that “BARTON used a phone he recently purchased and using information in that phone, responded to solicitations meant for the previous owner of the phone number”. Barton testifies in the associated Declaration that he did not do this (Barton Declaration ¶1) and they have no evidence to the contrary.

Second, as above, Plaintiff had no duty *not* to respond to SAHA’s solicitations.

**Why “SAHA is informed and believes and thereon alleges that BARTON opted in on a call on February 15, 2021” Fails**

This argument fails for three reasons.

---

<sup>12</sup> *N.L. v. Credit One Bank*, No. 2:17-CV-01512-JAM-DB, 2 (E.D. Cal. Nov. 8, 2018)

<sup>13</sup> *Holtzman v. Turza*, No. 08 C 2014, 10 (N.D. Ill. Oct. 19, 2010)

<sup>14</sup> *Fillichio v. M.R.S. Ass’ns, Inc.*, No. 09-612629-CIV, 2010 WL 4261442, at \*5 (S.D. Fla. Oct. 19, 2010)

<sup>15</sup> *State ex rel. Charvat v. Frye*, 114 Ohio St. 3d 76, 77 (Ohio 2007)

<sup>16</sup> *Manufacturers Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 139 S.W.3d 342, 344 (Tex. App. 2004)

- First, “[t]he TCPA exempts from liability automated calls made with the “*prior* express consent of the called party.””<sup>17</sup> Barton can’t have consented to the February 15 robocall *during* the call – that isn’t *prior* express consent of the called party. SAHA – with the burden of consent – makes no showing Barton consented *prior* to the February 15 robocall.
- Second, SAHA – with the burden of consent – makes no showing Barton consented to future calls using *artificial or prerecorded voice*. [47 U.S. Code § 227\(b\)](#):

“It shall be unlawful for *any person . . . to make any call* (other than a call made . . . with the prior express consent of the called party) *using* any automatic telephone dialing system or *an artificial or prerecorded voice* . . . to any telephone number assigned to a paging service, cellular telephone service.” Emphasis added.

SAHA has no evidence that Barton consented to further calls *using artificial or prerecorded voice*, let alone in writing:

“In 2012, the regulations were amended to require that a call using an ATDS or a prerecorded voice—which “introduces an advertisement or constitutes telemarketing,” or is made to a “residential line”—must have been made with the “prior express written consent of the called party.”” [Williams v. PillPack LLC](#), C19-5282 TSZ, 11 (W.D. Wash. Feb. 12, 2021).

SAHA has admitted placing two more such calls to Barton *after* February 15<sup>18</sup> (on February 19 and then again on February 22):

<sup>17</sup> [N. L. v. Credit One Bank](#), 960 F.3d 1164, 1168 (9th Cir. 2020). Emphasis added.

<sup>18</sup> Interrogatory #7 is from Exhibit K.

**INTERROGATORY NO. 7:** Between the dates of July 10, 2020 and July 1, 2021, what is the total number of times you used the autodialer mentioned in your answer to Interrogatory #3 (in the first set of Interrogatories) to initiate a call to (360) 910 1019.

**ANSWER:**

The dialer made to 360-910-1019. Here are the dates & times. It was placed on the dialer DNC list on 2-25-21, and there were no subsequent calls thereafter.

Call ID	Phone	Date	Time	Duration
18446222243	13609101019	2021-02-15	16:49:17.962290-08:00	492
18446222243	13609101019	2021-02-19	16:05:25.801715-08:00	86
18446222243	13609101019	2021-02-22	14:48:40.139507-08:00	353

- Third, SAHA has *another* consent problem. [47 C.F.R. § 64.1200](#)(d)(4) placed a duty on SAHA:

“A person or entity making an artificial or prerecorded-voice telephone call . . . for telemarketing purposes must provide the called party with the name of the individual caller, *the name of the person or entity on whose behalf the call is being made*”.

According to SAHA’s own transcript of the February 15 call (Exhibit E, top of page 1), SAHA identified themselves as “Nonprofit Alliance”<sup>19</sup>. SAHA isn’t

“Nonprofit Alliance”, they have a *d/b/a* of Nonprofit Alliance of Consumer Advocates. Worse, this *d/b/a* does not comply with [47 C.F.R. § 64.1200](#):

“The FCC clarified that providing a *d/b/a* in a telemarketing message is permissible, but it is insufficient to fully comply with Section 64.1200(d)(4). See 68 Fed. Reg. at 44163 (“The Commission recognizes that some businesses use “*d/b/as*” or aliases for marketing purposes. *The rule does not prohibit the use of such additional information, provided the legal name of the business is also stated.*”<sup>20</sup>). Because the Defendants failed to provide the “legal name of the business,” they ostensibly violated the regulation.”<sup>21</sup>

<sup>19</sup> The robocall portion didn’t identify SAHA by any name. See Exhibit B ¶10.

<sup>20</sup> <https://www.govinfo.gov/content/pkg/FR-2003-07-25/pdf/03-18766.pdf#page=21> Emphasis added.

<sup>21</sup> *Robison v. 7PN, LLC*, 569 F. Supp. 3d 1175, 1185-86 (D. Utah 2021)

1 If SAHA had identified themselves as Walmart, and Plaintiff consented to more calls,  
 2 that consent would cover future calls from *Walmart*, not SAHA. According to SAHA's  
 3 own call transcript (Exhibit E), SAHA can't have obtained Plaintiff's consent to future  
 4 calls from SAHA. They never used their actual business name, and they didn't even use  
 5 their *d/b/a* name – Nonprofit Alliance of Consumer Advocates.

### 6 **SAHA's Fraud by Nondisclosure Claim Fails**

7 Again, to the extent SAHA's fraud by nondisclosure claim is predicated on the allegation  
 8 Barton went on a website and requested calls (Dkt. 82 at ¶3.7, ¶3.8, ¶4.2, ¶4.4, ¶4.5, ¶4.6, ¶5.2,  
 9 ¶5.4), they admit this storyline is false.

10 Their admission (*Id* at ¶3.20) guts their allegation:

11 "SAHA received an email from BARTON after consenting to receive information which  
 12 stated "I am sorry, I am not really interested in loan modification. A couple of days ago I  
 13 got an illegal robocall and I played along to see who it was and unfortunately, it was you  
 14 folks. I have a mission to get rid of robocalls... if you folks would like to talk it over, I  
 15 am willing. Otherwise within a few weeks I will be down there for your company."

16 Plaintiff has testified (Plaintiff's Declaration ¶2-¶7) that once he had investigated and  
 17 identified the source of the robocalls – SAHA – from the email they sent (Exhibit G), he  
 18 immediately replied telling them he wasn't interested in their services and he gave the reason he  
 19 spoke to them (Exhibit H).

20 SAHA scraped public records, obtained Barton's phone number, and robocalled Barton  
 21 on February 15. Even if during the ensuing conversation Barton *had* consented to further  
 22 robocalls, Plaintiff's email to SAHA on February 17, 2021 canceled any reason SAHA could  
 23 believe Barton wanted more robocalls. When SAHA robocalled Barton *again* on February 19,  
 24 and *again* on February 22, they did so *after* Barton told them he didn't want their services on

February 17. Barton did not allege to have received any robocall during any period of time SAHA could claim Barton consented to robocalls.

### SAHA's Negligent Misrepresentation Claim Fails

Yet again, to the extent SAHA's fraud by nondisclosure claim is predicated on the allegation Barton went on a website and requested calls (*Id* at ¶3.7, ¶3.8, ¶4.2, ¶4.4, ¶4.5, ¶4.6, ¶5.2, ¶5.4), they admit this storyline is false.

SAHA has the same problem as above – he didn't ask for their February 15 robocall, and he emailed them on February 17 telling them he wasn't interested in their services. Therefore, by the time they robocalled again on February 19 and February 22, they did so days *after* Barton told them he didn't want their services. Barton did not allege to have received any robocall during any time SAHA could claim Barton consented to robocalls.

### The Burden of Proof on SAHA's Claim

Each element of fraud must be established by "clear, cogent and convincing evidence."<sup>22</sup> This is also true in a negligent misrepresentation claim.<sup>23</sup>

"Clear, cogent, and convincing evidence" denotes a quantum of evidence or degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt.<sup>24</sup> It is the quantum of evidence sufficient to convince the fact finder that the fact in issue is "highly probable."<sup>25</sup>

<sup>22</sup> *Stiley v. Block*, 130 Wn. 2d 486, 488 (Wash. 1996)

<sup>23</sup> *Lawyers Title Insurance v. Baik*, 147 Wn. 2d 536, 543 (Wash. 2002)

<sup>24</sup> *In re Deming*, 108 Wn. 2d 82, 109 (Wash. 1987). *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562 (Wash. Ct. App. 2010)

<sup>25</sup> *In re Welfare of Sego*, 82 Wn. 2d 736, 738 (Wash. 1973)

## SAHA Also Violated Washington State Law

Washington State RCW [80.36.400](#) (“WADAD”) prohibits automatically dialing phone numbers and playing a recorded message. “No person may use an automatic dialing and announcing device for purposes of commercial solicitation.” *Id* at 80.36.400(1)(b)(2).

“The text of the WADAD is substantially similar to its federal counterpart, as is its purpose.”<sup>26</sup> “A violation of the WADAD is automatically a violation of the Washington Consumer Protection Act (“WCPA”). See Wash. Rev.Code § 80.36.400(3).” *Id*.

As discussed above, Barton did not consent to the February 15, 2021 robocall. On February 17 Barton told SAHA he wasn’t interested in their services. SAHA’s use of an automatic dialing system and playing of recorded messages to Barton on February 19 and 22 was unsolicited.

## Conclusion

SAHA no longer claims Barton went to some website and asked for calls, admitting they scraped public records looking for people who might be receptive to their services. They thought they found such a person named William Wilder. Pepe Abad testified (Exhibit C) that when they find a potential customer, they pull all the phone numbers connected to that property and they call them all:

“Then we obtain client contact information from various search engines . . . this provides us all 'known' associated mobile phone numbers associated with that property address . . . We send . . . SMS messages to each record with brief information on our free loan modification services”. Exhibit C, page 1, lines 18-21

---

<sup>26</sup> [Chesbro v. Best Buy Stores, L.P.](#), 705 F.3d 913, 919 (9th Cir. 2012)

SAHA blasted over five dozen phone numbers with robocalls because they wanted to sell Mr. Wilder a mortgage. They weren't even trying to reach Mr. Wilder when they blasted Plaintiff, they knowingly and willfully dialed someone they knew *wasn't* Mr. Wilder.

Clearly, when SAHA blasts 65 phone numbers trying to reach one person, they know or should have known there would be a lot of collateral damage. They don't care.

SAHA is exactly the reason the TCPA was enacted – to stop telemarketers from blasting over five dozen phone numbers in search of one man. And to stop them from doing so anonymously.

SAHA should not be allowed to openly violate telemarketing law, and then turn around and claim the people they are illegally calling can't investigate to them, learn their identity, and then hold them accountable.

Our own circuit recently held 'Congress "establishe[d] the substantive right to be free from certain types of phone calls and texts absent consumer consent . . . [and] identified unsolicited contact as a concrete harm." <sup>27</sup>.

SAHA can't show by clear, cogent, and convincing evidence that Barton induced SAHA to call him and SAHA suffered injury. Barton's investigation of SAHA's illegal calls isn't fraud or any of its relatives. To the extent SAHA was injured by Barton *identifying* them and then *filing suit*, that is the TCPA's purpose.

"The statutory damages available under the TCPA are, in fact, specifically designed to appeal to plaintiffs' self-interest and to direct that self-interest toward the public good: "like statutory compensation for whistleblowers," they "operate as bounties, increasing the incentives for private enforcement of law." Chapman v. Wagener Equities, Inc. <sup>28</sup>

---

<sup>27</sup> Chennette v. Porch.com Ninth Circuit 2022

<sup>28</sup> Chapman v. Wagener Equities, Inc., 747 F.3d 489, 490 (7th Cir. 2014)

1 “In creating a private right of action under the TCPA, Congress chose to incent private  
 2 litigants to enforce the law, rather than having government regulators do it. The fact that  
 3 Mr. Shelton and other litigants respond to the economic incentives that Congress created  
 is not evidence of misconduct.” Shelton v. FCS Capital LLC<sup>29</sup>.

4 SAHA’s counterclaims should be dismissed.

5  
 6  
 7 s/ Nathen Barton  
 (signed)

1/5/2023  
 (Dated)

8  
 9 Nathen Barton  
 (469) 347 2139  
 10 4618 NW 11<sup>th</sup> Cir  
 Camas WA 98607

11  
 12 CERTIFICATE OF SERVICE

13 I hereby certify that on January 5, 2023, I caused the foregoing document to be  
 14 electronically filed with the Clerk of the Court using the Electronic Filing (CM/ECF) system,  
 15 which will send notification of such filing to all counsel of record and all pro se parties registered  
 16 to use the CM/ECF system.

17  
 18 s/ Nathen Barton  
 Nathen Barton

1/5/2023  
 (Dated)

19  
 20  
 21  
 22  
 23  
 24 <sup>29</sup> Shelton v. FCS Capital LLC, Case No. 2:18-cv-03723-JDW, 5 (E.D. Pa. Jun. 17, 2020)